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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 127

E. CREEKMORE, GENERAL CHAIRMAN OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
Petitioners,

vs.

PUBLIC BELT RAILROAD OF NEW ORLEANS AND CITY OF NEW ORLEANS, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES J. FARNAN,
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THOMAS X. DUNN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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vs.

PUBLIC BELT RAILROAD OF NEW ORLEANS and CITY OF NEW ORLEANS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, all appellants below, respectfully pray for the issuance of a writ of certiorari to review the judgment below dismissing petitioners' amended complaint (R. p. 72).

Jurisdiction.

The opinion of the Trial Court dismissing the amended complaint will be found at R. p. 54. The opinion of the court below will be found at R. p. 69. The opinion of the Trial Court is unreported and that of the court below is reported in 134 F. (2d) 576.

Summary Statement of Matter Involved.

The amended complaint was filed in the District Court by plaintiff as agent on behalf of five employees of the Public Belt Railroad, members of the Brotherhood of Maintenance of Way Employes, under Section 16(b) of the Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. A. 216(b), asking for a judgment of $1246.00, representing a 6¢ per hour difference between the 30¢ hour-wage rate paid by the Public Belt Railroad and the order of the Administrator of the Fair Labor Standards Act, setting a minimum wage rate of 36¢ per hour for the Railroad Carrier Industry, as provided by Section 8 of the Fair Labor Standards Act, 52 Stat. 1064 (29 U. S. C. A. 208).

The amended complaint alleged that pursuant to Sections 5 and 8 of the Fair Labor Standards Act, hereinafter called the Act, the Acting Administrator of the Wage and Hour Division of the United States Department of Labor appointed an Industry Committee for the Railroad Carrier Industry, and after investigation and hearings, recommended to the Administrator the minimum wage rate in the Trunk and Short Line Divisions of the Railroad Carrier Industry (R. p. 22).

After extensive hearings the Railroad Carrier Industry recommended the minimum wage rate for all Trunk Line Railroads to be not less than 36¢ per hour and for all Short Line Railroads a minimum wage rate of not less than 33¢ per hour (R. p. 24). The report and recommendations of the Railroad Carrier Industry Committee were approved by the Administrator of the Wage and Hour Division February 14, 1941 (R. p. 22) and the Administrator of the Wage and Hour Division ordered the minimum wage rates to be effective as of March 1, 1941, for all employees of Short and Trunk Line Railroads, that were subject to

Part I of the Interstate Commerce Commission Act (R. p. 25).

The complaint further alleges that the Public Belt Railroad is a Trunk Line Division, and subject to Part I of the Interstate Commerce Commission Act, having an annual operating revenue of more than one million dollars per year and, therefore, subject to the minimum wage rate of 36¢ per hour (R. pp. 17-18).

As of the effective date of the order, the Public Belt Railroad was paying the plaintiffs herein and other employees similarly situated in its Maintenance of Way Department the sum of 30¢ per hour (R. p. 18) or $12.00 for a 40 hour week or $14.40 for a 48 hour week. The complaint further alleges that the Public Belt Railroad refused to pay the minimum wage rate of 36¢ per hour as required under the wage order of said Administrator (R. p. 18). The defendants moved to dismiss the amended complaint on the ground that the Railroad was municipally owned and that by Section 3(d) of the Fair Labor Standards Act 52 Stat. 1060, 29 U. S. C. A. 203, defining employers covered by the Act, the Public Belt Railroad was excluded from the provisions of the Act. Section 3(d) of the Fair Labor Standards Act provides:

> "Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States, or any state, or political subdivision of a state".

The Trial Justice dismissed the amended complaint filing a written opinion (R. p. 58) holding that the Public Belt Railroad being wholly owned and operated by the City of New Orleans was expressly excluded by virtue of Section 3(d) of the Act in that it was "a political subdivision of a state", and that the Wage and Hour Administrator in an advisory opinion (R. p. 51) had ruled that the said Public

Belt Railroad was excluded from the provisions of the Act by virtue of Section 3(d) thereof (R. p. 53). The court below adopted the reasoning of the Trial Judge and affirmed the dismissal of the amended complaint on the grounds that a municipally owned railroad was exempt from the minimum wage requirements of the Act by virtue of Section 3(d), excluding employees "of the United States or any state or political subdivision of a state" (R. p. 69).

Statute Involved.

The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. 201-219.

The court below held that the Public Belt Railroad was excluded by virtue of Sec. 3(d) of the Act, 52 Stat. 1060, 29 U. S. C. A. 203, *supra.*

PERTINENT SECTIONS OF THE ACT.

Title 29, Section 205 of the Act 52 Stat. 1062, 54 Stat. 616, entitled *Industry Committee.*

> "The Administrator shall as soon as practicable appoint an Industry Committee for each industry engaged in commerce or in the production of goods for commerce".

Title 29, U. S. C. A., Section 208, 52 Stat. 1064, Wage Orders:

> "(a) With a view to carrying out the policy of sections 201-219 of this title by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee each such industry, and the industry committee shall from time to

time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under sections 201-219 of this title. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

* * * * * * *

"(f) Orders issued under this section shall define the *industries* and *classifications therein to which they are to apply*, and *shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.* No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance".

Manner of Operation of Public Belt Railroad.

The Public Belt Railroad is a railroad carrier engaged in the transportation over its lines of freight and passenger cars from points on its lines in the City of New Orleans to points outside the State of Louisiana. It is known in railroad terminology as "switching company" (R. p. 17).

The Public Belt Railroad picks up all railway cars brought into the City of New Orleans by other railway carriers from points both inside and outside the state, carries these cars over its own lines in the State of Louisiana and delivers said cars at their respective destinations and terminals in New Orleans, and where in turn the other railway carriers transport them to points outside the State of Louisiana (R. pp. 16, 37).

The Public Belt Railroad delivers freight in car load lots and even in less than car load lots (R. pp. 16, 37). This Railroad also picks up freight in less than car load lots from the wharves in New Orleans, especially fruit, bananas and spices from the tropics, that are brought in by steamship and barge lines and transports it over its own line to other terminals of other railroad carriers, where it is then delivered outside the State of Louisiana (R. p. 16).

Defendant further delivers freight brought into the city by other carriers from points outside the State and carries it directly to the wharves for further shipment by ships and barges. It serves all carriers who enter the City of New Orleans, together with handling freight from ship and barge at the wharves and carries freight directly from a number of industries within the City of New Orleans, by handling freight destined to and from points inside and outside the State by delivering the goods to the respective terminals of the various railroad carriers.

Ownership of Public Belt Railroad.

The Public Belt Railroad is owned and operated by the City of New Orleans. The City of New Orleans, by virtue of an ordinance of October 8, 1904 (R. p. 51) set up a commission known as the Public Belt Railway Commission (R. p. 33) composed of the Mayor and 16 citizens of the City of New Orleans who were to operate this railroad.

> "To Operate said Public Belt Railroad for the transportation of merchandise and freight in car loads or less than car loads and for the transportation of passengers for such rates, charges or tariff as may by said commission by and with the approval of the council of the City of New Orleans by each adopted" (R. p. 37).

The ordinance further provided:

> "Said commission shall have power and authority to make all regulations and by-laws for the conduct of its business as it sees fit and do all necessary things to accomplish its purpose and object; to employ all necessary persons and working force and to fix all compensation and salaries. All salaries of officers and employees shall be paid from the funds of the commission" (R. p. 38).

Thus, the salaries of these employees are not paid by the City of New Orleans, but are paid out of the funds and operating revenues of the railroad.

Question Presented.

Is a municipally owned railroad exempt from a minimum wage order for the Railroad Carrier Industry, issued by the Administrator of the Fair Labor Standards Act, by virtue of Section 3(d) of the Act, which excludes as an employer the "United States or any State or political subdivision thereof", where that railroad is subject to the Interstate Commerce Commission Act, the Railway Labor Act, Railway Retirement Act, and all Federal legislation governing and controlling the railroad industry, and where such railroad is serving purely proprietary benefits of the city and is not part of the essential functional operation of the municipal government.

Reasons Relied On for the Allowance of the Writ.

IMPORTANCE OF QUESTION.

The primary question presented, involves the construction of Section 3(d) of the Fair Labor Standards Act 52 Stat. 1060 (29 U. S. C. A. 203(d)) which, if the ruling of the lower court is upheld, would exempt the employers of all municipally owned railroads that are subject to Part I of the Interstate Commerce Commission Act from paying the minimum wage rate that is required under the Act of all other railroad carriers in the United States. The construction adopted by the court below would permit municipally owned and state owned railroads to pay substandard wages below the minimum set by the Railroad Carrier Industry Committee for all other Railroad Carriers subject to Part I of the Interstate Commerce Commission Act.

By the ruling of the court below all employees of municipally and state owned railroads are denied the beneficial effect of the wage provisions of the Act. The question here presented to the court is of vital importance to all railroad employees, since the ruling below exempts the Public Belt Railroad under the Act, when that Railroad is in direct competition with other railroad carriers throughout the United States.

The decision below allows the State "to go into business" far afield from its natural sphere as a political entity, wherein it competes with other private enterprises, but exempts it from meeting the requirements of this Act when the primary purpose of the Act was to remedy substandard working conditions. The decision of the court below is contrary to the intent of Congress, since in all other beneficial legislation passed by Congress for the Railroad Industry this Railroad is specifically covered. Congress has shown a clear intent that this particular type of railroad

should be covered under the Act. Congress has covered it by the Safety Appliance Act, 27 Stat. 531, Title 45 U. S. C. A., Section 1; Liability for Injuries to Employees, 53 Stat. 1404, 45 U. S. C. A., Section 51; Hours of Service Act, 34 Stat. 1415, 45 U. S. C. A., Section 61-62; Railway Labor Act, 44 Stat. 537, 54 Stat. 785-786, 45 U. S. C. A., Section 151; Retirement of Railway Employes, 56 Stat. 209, 45 U. S. C. A., Section 228.

Further, the construction of the lower court contradicts the express wording of the Act. The court below ruled that in accepting the literal meaning of the word "state or political subdivision" the Public Belt Railroad was excluded from meeting the minimum wage requirements of the wage order. The court below arrived at an unreasonable and an absurd result by the alleged literal meaning of the words "state or political subdivision", for in an examination of the whole Act, it will be found that Congress not only intended that this Railroad be covered, but the Act specifically provides that all railroad employees should receive the benefits of the Act. Section 7 of the Act, 55 Stat. 756 (Title 29 U. S. C. A., Section 207) provides for the establishment of maximum hours of work in a given week. Section 13(b) of the Act 53 Stat. 1266 (Title 29 U. S. C. A., Section 213(b)) provides:

> "(b) The provisions of section 207 of this Title" (Title 29, Section 207) "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49; or (2) any employee of an employer subject to the provisions of section 1-27 of Title 49".

Exception (1) of this paragraph, *supra*, applies to motor carriers, and Exception (2) applies to all railroads in the United States, including the Public Belt, which are subject

to Part I of the Interstate Commerce Commission Act 41 Stat. 474-478 (Title 49 U. S. C. A., Section 1-47) and confers on the Interstate Commerce Commission the power and right to regulate the maximum hours of service. The Congress here specifically provided, that inasmuch as it had regulated for all carriers as to the maximum hours of service and conferred that power upon the Interstate Commerce Commission, it specifically exempted the Railroad Industry from the maximum hours provision of Section 7 of the Fair Labor Standards Act. But in doing so, Congress thereby expressly provided that all railroad carriers coming within the meaning and coverage of the Interstate Commerce Commission Act were to be covered by the minimum wage provisions of the Fair Labor Standards Act.

The Public Belt Railroad by judicial decision has been held to come within the meaning of the Interstate Commerce Commission Act, and it is admitted in the record. The Public Belt Railroad is subject to the Interstate Commerce Commission (Title 49, U. S. C. A., Section 1-27) Act.

Higginbothan v. *Public Belt R. R.,* 192 La. 549.

The Railroad Carrier Industry Committee that was set up pursuant to Section 5 of the Fair Labor Standards Act 54 Stat. 615 (R. pp. 22-27) defined the Railroad Carrier Industry and divisions thereof as follows:

> "For the purposes of this order the term 'railway carrier industry' means the industry carried on by any express company, sleeping car company, or carrier by railroad, subject to Part I of the Interstate Commerce Commission Act * * *."

This Industry Committee comprised four disinterested persons representing the public and a like number representing employers in the industry, and a like number repre-

senting railroad employees. The order covered all carriers subject to Part I of the Interstate Commerce Commission Act, and thus it was that this Committee, who knew intimiately the Railroad Industry, expressly covered the Public Belt Railroad. This Committee in covering all carriers subject to Part I of the Interstate Commerce Commission Act carried out the true legislative intent of the Congress.

Thus, in exempting the Railroad Industry from the maximum hours provisions of the Fair Labor Standards Act, Congress knew that it had already legislated for the Railroad Industry on this particular provision by granting that power to the Interstate Commerce Commission, and thus expressly provided that all the railroads, who were engaged in interstate commerce or who were subject to the Interstate Commerce Commission authority, be bound and covered by the minimum wage under the provisions of that Act. In construing this Act, it is presumed that Congress had former remedial statutes before it, and that it was acquainted with their judicial construction.

State v. *Gerhardt*, 145 Ind. 439, 44 N. E. 469, 35 L. R. A. 313;

Reiche v. *Smythe*, 80 U. S. 162, 13 Wall. 162, 20 L. Ed. 566;

Maddock v. *Magone*, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482.

Inasmuch as this statute is a remedial one under the cases, it should have been liberally construed (*Fleming* v. *Hawkeye Pearl Button*, 113 F. (2d) 52 and the judicial distinction of a municipal corporation acting in a governmental or essential function and a municipal corporation acting in a purely proprietary capacity should have been adopted by the court below in construing the Act.

Probable Conflict With Other Decisions of This Court.

It is a well known doctrine, long applied by this Court, that a municipal corporation or State acting in a purely proprietary field as distinguished from a governmental function is subject to the same provisions of law governing private enterprises. (*Helvering* v. *Powers*, 293 U. S. 214, 79 L. Ed. 291, 55 S. Ct. 171.)

The construction given under this Act by the court below is contrary to this well settled doctrine. In the 1913, 1916, 1917 Internal Revenue Statutes, Congress exempted from taxation all officers or employees of the "state or any political subdivision thereof", using language almost identical with that under the Act. But this Court never held that Congress intended that an employee working in a purely proprietary capacity was exempt from the taxation. *Helvering* v. *Powers, supra.*

After this particular provision was dropped from the income statutes in 1917, the court continued to uphold the distinction between a proprietary and functional activity of the State government.

The Public Salary Tax Act of 1939, 53 Stat. 575-577, I. C. C. H. Sec. 26, 042 included for the purposes of taxation from and after January 1, 1939, all the employees of the State, regardless of the nature of their employment, but abated, and if paid, made provisions for a refund of all taxes prior to January 1, 1939, to "an officer or employee of a state or any political subdivision thereof, or any agency or instrumentality of any one of the foregoing". This particular language is almost identical with that used in Section 3(d) of the Act, and if this Court were to construe the section of the Public Salary Tax Act exempting "employees of a state or any political subdivision" as the court below has construed Section 3(d) of the Act, then this Court would be holding contrary to that well known

construction that has been given to words of this character under all the tax acts and would be holding in effect, that all employees of the State government would be excused from the tax. This would be entirely contrary to the decisions of this Court, which have always made this well known distinction.

Helvering v. *Powers, supra;*
Metcalf v. *Mitchell,* 269 U. S. 513, 70 L. Ed. 384;
Buckstaff Bathouse Co. v. *McKinley,* 308 U. S. 358, 84 L. Ed. 322.

Again, in character with the decisions of this Court, the Treasury Department in its Regulations T. D. 5214 (Section 18.2) approved Jan. 15, 1943, in keeping within the well defined distinction as laid down by this Court has determined that "an officer or employee of a state or political subdivision" is entitled to the benefits of Section 203 of the Public Salary Tax Act "if under these regulations the Commissioner of Internal Revenue finds that such compensation *was for personal service rendered in the exercise of a governmental function as distinguished from proprietary function",* and in Section 18.3 of the above regulations, it is pointed out that such employees as school teachers, liquidators of banks and insurance companies, taken over by the State, etc. are allowed an abatement or refund of the tax, but that employees of *a State liquor store or a municipality owned railroad are not.*

Wherefore petitioners pray that the petition herein be granted and the judgment below be reversed.

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SUPREME COURT OF THE UNITED STATES

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PUBLIC BELT RAILROAD OF NEW ORLEANS and CITY OF NEW ORLEANS, Et Al.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Nature of Operation of Public Belt Railroad Under Louisiana Cases.

It is contended by respondent that the Public Belt Railroad Commission is immune from the provisions of the Act, inasmuch as it is a political subdivision of the State of Louisiana. It can be seen, after reading the statutes authorizing the operation of this railroad by the State, that the State has no actual control or supervision over the operation or the maintenance of the railroad. The railroad is operated by the Commission. It is operated for profit, and it is operated not unlike any other railroad in the

United States. The Commission, as a Commission, is not about the business of the State, but is engaged in a private enterprise in competition with private carriers.

In the case of *Davis* v. *New Orleans Public Belt Railroad*, 155 La. 504, 99 So. 419, the court, in holding that this particular railroad-defendant was subject to be sued in tort by the estate of a person killed through the negligence of an operation of an agent or employee, said:

> "Having thus shown the nature and origin of the defendant and the manner in which it operates and functions, as well as the limitation placed upon it, can it be said to be exclusively a governmental agency and if not was the work in which it was engaged at the time of the accident such as to render it liable for the death of the plaintiff's son?"

And the court further said:

> "The duty of operating a Public Belt Railroad through a Commission was voluntarily assumed by the City of New Orleans in its original ordinance heretofore mentioned, which was subsequently approved and ratified by the legislature and constitutionally amended. It is true that the said Act and amendment have subsequently hedged it about with certain restrictions and limitations but this was for the protection of the bondholders and to assure a continuance of its operations for the benefit of the people of the community. *However, this has not had the effect of making it a state agency* (italics ours) solely charged with the discharge of a governmental function; nor has there been any provision exempting it from the character of liability here claimed. *Its end and purpose still remain the same, i. e., that it is a department of the City of New Orleans, discharging a municipal or corporate function for private gain and for the private benefit and advantage of its inhabitants.*" (Italics ours.)

The court below held that, inasmuch as the Railroad Commission was a department of the City of New Orleans,

that, therefore, it was a political subdivision of the State of Louisiana. As authority, the court relied not only on *Davis* v. *Public Belt Railroad, supra,* but also on *Solomon* v. *City of New Orleans,* 156 La. 631. In the *Solomon* case, the Louisiana Supreme Court held that, under the Act creating the railroad, there was no reservation of supervision or control in the State, but to the contrary,

> "the entire and absolute control and administration was recognized and confirmed in the city, to be exercised through a Commission to be appointed or which had already been appointed by the city, and the ownership of the railroad system was dedicated to the people of the city. This was but declaratory of an existing fact. It has never been considered, so far as we are advised, a governmental function of the state to build, equip and operate railroads for the benefit of the people of the state at large or for the people of the municipalities. The state was under no particular or special obligation to establish the railroad system under consideration for the inhabitants of the city, and no intention on the part of the state to do so on its own behalf can reasonably be inferred from the legislation referred to. As we have heretofore stated, the only purpose had in view, as clearly appears from the language of the entire Act, was to approve and confirm what the city had already done and to grant such power to the city as was necessary to enable the city to carry out the *business venture* (italics ours) it had inaugurated in the interest of the people of the city. The contention, therefore, that the City of New Orleans in its connection with the Belt Railroad System *is merely representing the state in the capacity of the state's agent is as unjustifiable as it is fundamentally unsound.* Nor is there any greater force in the contention that the Board of Commissioners is a governmental agency separate and distinct from the municipality. The Board is the agent of the city and not of the state. It is subject to appointment by the Mayor and Council and at all times under the control of the Mayor and Council."

Again, in *Higginbothan* v. *Public Belt Railroad*, 192 La. 549, plaintiff argued that the Interstate Commerce Commission had no control over the railroad, since the State, under its sovereign power, had commanded the city to continue to operate the railroad through a Commission. The court, in holding that the railroad was subject to the Interstate Commerce Commission Act, said:

> "Counsel's theory seems to be that inasmuch as the Public Belt Railroad is the property of the people of the City of New Orleans and is operated by the city through an agency created by law, Federal statutes regulating interstate commerce have no application to it because it is in fact being operated by the state itself. The same argument was made in the case of United States *v.* California, 297 U. S. 175. Practically the same situation was presented in that case as in the case at bar, and it was held that the State of California, being engaged in interstate commerce by rail, had subjected itself to the Commerce power of the United States."

The Clear Intent of Congress Was to Include This Particular Type of Railroad Under the Provisions of the Act.

The Lower Court in its opinion ruled that it was the clear intent of Congress to exempt the Public Belt Railroad from the coverage of this Act and that there was no ambiguity or doubt from a reading of the Act that this was the legislative intention. In the interpretation and construction of any statute the primary rule is to ascertain and give the effect to the intention of the legislature.

The Lower Court in its interpretation of employer under Sec. 3(d) of the Act (29 U. S. C. A. 203(d)), took the literal meaning of the word "political subdivision" and held the Public Belt Railroad to be a political subdivision of the

State of Louisiana and, therefore was not included as an employer within the meaning of the Act.

It is petitioners' contention that from a reading of the entire Act and from the public policy expressed in the Preamble of the Act, that it was clearly the intention of Congress to include any railroad in interstate commerce, even though that railroad was owned and operated by a municipality or any commission appointed by a municipality. Sec. 3(d) of the Act exempted all employees of the United States Government, a State Government, or of a municipality, known as a political subdivision, when and if the United States, a State Government, or a political subdivision was acting in its natural orbit of governmental activity and carrying out the primary function and purpose of a State, Government, or of a municipality.

The reason and intent of the statute, as indicated by its general terms, should prevail over the letter of the statute when the plain purpose of the Act will be defeated by strict adherence to its verbiage. In such cases the carrying out of the legislation intention is the prime and sole object of all rules of statutory construction and this can only be accomplished by departure from a literal interpretation of the language employed. Thus it is, that Courts are not always confined to the literal meaning of a statute, because the letter, purpose, and intent of the legislature will prevail over the literal imports of the words.

Shelvy v. *Guy*, 24 U. S. 361, 11 Wheat. 361, 6 L. Ed. 495.

Chicago, etc. R .R. Co. v. *Guffey*, 122 U. S. 561, 30 L. Ed. 1135, 7 S. Ct. 1300.

United States v. *Holy Trinity Church*, 143 U. S. 457, 36 L. Ed. 226, 21 S. Ct. 511.

Brown v. *Duchesne*, 60 U. S. 183, 15 L. Ed. 595, 19 How. 183.

In reading the Act it can readily be seen that it is remedial; that its objects and purposes are beneficial in that it uplifts the standards of living necessary for health and efficiency and the general well-being of labor. It covers all industries engaged in interstate commerce, including the Railway Industry. Since the purpose of the Act is remedial and beneficial it is a familiar rule and a canon of statutory construction that not a strict but a liberal construction should be made, and that as many industries should be made subject to the provision of the Act as possible to the end that the legislative intention should be effectuated in order to carry out the remedial and beneficial objects and purposes of the Act.

In its Preamble of the Act, Congress stated as follows:

> "The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the separate states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> "It is hereby declared to be the policy of Sections 201-209 of this title through the exercise by Congress of its power to regulate commerce among the several states to correct and as rapidly and practicably to eliminate the conditions above referrred to in such industries without substantially curtailing employment or earning power."

Another rule of statutory construction which the court below completely ignored is the well settled rule that the court will not look to a particular clause of an act only, in order to arrive at the intention of the law maker, but the intention of the legislation must be deduced by a view of the whole statute and from its every material part, and by statutes in *pari materia.*

Richardson v. *Harmon,* 222 U. S. 96, 56 L. Ed. 110, 32 S. Ct. 27.

The rule as it is generally understood exists for the purpose of discovering the legislative intention, and statutes relating to the same subject are to be compared and should be read and construed in reference to each other, so that effect may be given to all of the benefits of each, if that can be done by any fair and reasonable construction. This rule applies not only to contemporaneous statutes, but also earlier statutes, because the legislature is presumed to have former statutes before it and to have been acquainted with their judicial construction and to have passed new statutes on the same subject with reference thereto.

Converse v. *United States,* 62 U. S. 463, 21 How. 463, 16 L. Ed. 192.

State v. *Gerhardt,* 145 Ind. 439, 44 N. E. 469, 35 L. R. A. 313.

The Lower Court completely ignored all other Federal legislation passed by the Congress of the United States on behalf of railroad employees, which was binding and covered all of the employees of the Public Belt Railroad of New Orleans. It is not disputed or denied in this record that the defendant carrier is subject to the following Acts of Congress:

"The Safety Appliance Act" (Title 45 U. S. C. A., Sec. 1). This Act of Congress passed on March 2, 1893 in order to protect the public and various employees of the carrier, set up certain safety standards in the operation of its equipment. The Public Belt Railroad is covered by this Act.

The Public Belt Railroad is subject to the Liability for Injuries to Employes due to the negligence of the carrier (45 U. S. C. A., Sec. 51).

Congress has further legislated limiting the hours of service of employees on railroad carriers, known as the "Hours of Service Act" (45 U. S. C. A., Sec. 61-62). In the negligent liability enactment and the hours of service enactment, Congress expressly legislated for the public good on the relationship between the carrier and its employees. The defendant carrier is bound by both of these Acts of Congress.

On July 15, 1913, in order to effectuate the free flow of goods in commerce and to prevent industrial disputes between the carrier and its employees Congress passed an act regulating the relationship between the carrier and its employees, by setting up a method for mediation, conciliation and arbitration in labor controversies between carriers and employees. 45 U. S. C. A., Sec. 101, *et sequitur*. Later this Act was repealed and the present Railway Labor Act was set up by Congress in Title 45 U. S. C. A., Sec. 151, *et sequitur*. This particular statute compels the carrier defendant to recognize the bargaining representative of all its employees and to bargain and treat with the collective bargaining representatives, and to file all its collective bargaining agreements with the National Mediation Board, and further set up Regional Boards of Adjustment throughout the United States to construe and pass upon all provisions of these collective bargaining agreements. The de-

fendant carrier comes within the legislative mandate of this particular Act of Congress.

Congress has set up an Act entitled "Retirement of Railway Employees", 45 U. S. C. A., Sec. 228, *et sequitur,* which is commonly known as the "Railway Retirement Act of 1937", wherein the carrier and its employees, under the "Tax on Carriers and Employees Act", Title 45 U. S. C. A., Sec. 241, must set aside a certain payment to the United States Treasury for the retirement of the employees. Here Congress again motivated by a wise social policy has enacted this legislation for the benefit of the employees of this defendant.

Thus it is, the Congress has legislated in the past, setting the maximum hours of service to be worked by the employees of the defendant carrier; has set up the National Mediation Board to regulate the bargaining rights of these employees and compel the carrier through the processes of the Railway Labor Act to give full freedom of association to the employees in selecting their collective bargaining agreements; and has further set up System Boards of Adjustment, to pass upon the provisions and interpretations of these collective bargaining agreements. Further, Congress has set up the Railway Retirement Act for the pensioning of old employees.

In approaching the construction of the Fair Labor Standards Act, we submit that the court below should have read this Act in the light of the prior legislative Acts of the Congress that attached and bound the defendant carrier even though it was municipally owned. But the court ignored other remedial and social legislation which covers this defendant carrier and which stands *in pari materia* with the Fair Labor Standards Act.

We submit that it is a strained and tortured judicial construction that would hold this defendant carrier subject

to the Hours of Service Act, the Railway Labor Act, the Railway Retirement Act, the Safety Appliance Act and other Federal remedial statutes, and then conclude that Congress never intended it to be covered by a minimum wage act. A correct judicial construction of a statute was adopted by the Circuit Court of Appeals for the Ninth Circuit in the *State of California* v. *Anglim,* 129 F. (2d) 455, where a Belt Line Railroad, owned and operated by the State of California, attempted to evade the provisions of the Railroad Retirement Act, and the court there held the Belt Line Railroad, though owned and operated by the State, to be subject to the Railroad Retirement Act, and reasoned that in construing the Act, prior Acts of Congress of a remedial nature and purpose would be a guide in holding that the Belt Line Railroad was within the Railroad Retirement Act.

The court in the *Anglim* case, *supra,* further reasoned that the State of California departed from its governmental field and went into the proprietary field and lost its cloak of immunity as a sovereign State exempt from the field of Federal taxation.

Congress intended beyond question that good would result from this legislation, and Congress has covered the employees of this defendant carrier by all of its previous beneficial legislation. Thus, it seems that to deny this small group of employees the rights and privileges that are secured to the thousands of other workmen in the Railroad Industry, is a strained construction of the Act.

The Exemption Should Be Strictly Construed.

It should be kept in mind that a strict construction should be placed on the claimed exemption of the defendant carrier and the most liberal construction on the claimed coverage by the plaintiffs. But the court below exempts a

carrier, who is covered by all other Federal legislation, and whose employees are covered by all other remedial railroad legislation, from the minimum wage provisions of the Act.

Thus construing this Act with companion legislation like the Railway Labor Act, we have a Federal statute setting a minimum wage standard and yet the statutory bargaining agent is powerless under the Federal statute to compel the railroad carrier to pay the minimum wage ordered for all other railroad employees in the United States in the Maintenance of Way Department of railroads.

It would be a strange rule of construction that would lead us into the "bad results" and "injurious consequences" by holding this carrier to be exempt under the Act.

> "The legislature is presumed to have intended that good will result from its laws, and a bad result suggests a wrong interpretation." *People ex rel. Beamon* v. *Feitner*, 168 N. Y. 360.
>
> "In interpreting a statute it cannot be presumed that the legislature intended unwise or injurious results to flow from its action, and where one construction would result in mischievous or disastrous consequences, a more fortunate construction must be sought." *Hayden* v. *Pierce*, 144 N. Y. 512.

In *United States* v. *California*, 297 U. S. 175, 80 L. Ed. 567, this Court held that a terminal railroad owned and operated by a State for the same purpose as defendant railroad was subject to the Federal Safety Appliance Act. The court said:

> "California by engaging in interstate commerce by rail has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial to protect employees and the

public from injury because of defective railway appliances (citing cases), and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. * * * No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the Act whenever a state as well as a privately owned carrier brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection."

In order to bring themselves within the exception under the Act as a "political subdivision", the respondents must bring themselves not only within the letter of the exception but the spirit of the exception. In the case of *Bowie* v. *Gonzalez*, 117 F. (2d) 11, the court said:

> "The scheme of the statute (Fair Labor Standards Act) is broad and comprehensive with the obvious purpose of including all employees in interstate commerce except those specifically excepted. Being a remedial statute, the appellants must bring themselves within both the letter and spirit of the exceptions since they are subject to a strict construction."

And in *Fleming* v. *Hawkeye Pearl Button Company*, 113 F. (2d) 52, the court said:

> "We must assume that all employees in interstate commerce so far as reasonably possible should be made subject to the provisions of the Act. This is emphasized by the title, the Findings and Declaration of Policy contained in Section 2, the inclusiveness of the language of Section 6 ('every employer') and of Section 8(a), reciting that 'the object of a universal minimum wage of forty cents an hour of each industry engaged in commerce or in the production of goods for commerce', etc.

"Section 13(a) (5) (which is an exemption for those in maritime pursuits) creates an exception to the general scope of the Act, and hence is subject to strict construction (citing cases). In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, *must establish it as being within the words as well as within the reason thereof.*" (Italics ours.)

The court below erred in simply reading Section 3(d) of the Act, defining an employer, and should have given, under the circumstances, as liberal a construction on behalf of the employers as possible having the complete Act before it.

In *United States* v. *American Trucking Ass'n*, 310 U. S. 532, 60 S. Ct. 1059, 84 L. Ed. 1345, the court, speaking on the method and the function of the court in the interpretation of a statute said:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intent. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of the statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature understood to give expressly to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases, we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results, but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court

> has followed that purpose, rather than the literal words. The interpretation of the meaning of statutes, as applied to justiciable controversies is exclusively a judicial function. * * * Emphasis should be laid too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes, should not be given a wide meaning contrary to a settled policy, 'excepting as a different purpose is plainly shown'."

To the same effect, see:

Town of Clayton v. *Colorado & S. Railroad Co.*, 51 Fed. (2d) 977;
Barrett v. *Van Pelt*, 268 U. S. 85, 69 L. Ed. 857, 45 S. Ct. 437.

The Operation of the Railroad Is Purely Proprietary.

It is elementary that a governmental state agency is subject to the taxing power of the Federal Government when engaged in an enterprise which is purely proprietary. The immunity that exists on behalf of agencies engaged in the usual functions of the State from Federal taxation is implied from the nature of our Federal system, and is equally a restriction on the taxing power of both the State and Federal Government on the instrumentalities of the other. But the Supreme Court has never allowed this immunity from taxation to be extended so that it would withdraw from the taxing power which has always been traditionally within the Federal Government. The court has always looked to the particular activities in which the State is engaged, in order to determine whether the particular activity is subject to the Federal taxing power. In this connection, it might be stated here that the powers and duties of a municipal corporation fall into two categories—governmental and proprietary. In its governmental activi-

ties the municipal corporation functions as an agent of the State for the benefit of the public generally, and not to promote the private interests of the local community. For example, in matters pertaining to public health, education of the young, prevention of crime and fire, and care of the poor, the city or governmental agency, in the performance of these public services is immune from Federal taxation. The proprietary activities of the municipality provide for the local convenience of the citizens in which, of course, the municipality has a private interest. For example, in the operation and maintenance of water and light plants (*Davoust* v. *Alameda*, 149 Ca. 69, 84 Pac. 760) or a belt railroad (*Davis* v. *New Orleans Public Belt Railroad*, 155 La. 504), construction or repair of sewers (*Baker & Co.* v. *Hollis*, 169 Okla. 253, 36 Pac. (2d) 757), and any business conducted for profit (*O'Donnell* v. *N. Attleboro*, 212 Mass. 243, 98 N. E. 1084), the municipality in the performance of these proprietary functions is bound by all the rules of law and procedure applicable to any other private corporation or individual engaged in like enterprise, operating for private gain.

In the *Solomon* and the *Davis* cases, *supra*, against this defendant-carrier, the courts said that the operation of the railroad was one which a government did not normally undertake, and, therefore, was subject to suit in tort as any other private enterprise, because its operation was purely proprietary; and this Court, in the analogous field of taxation, has held this in the leading case of *Helvering* v. *Powers*, 293 U. S. 214, 79 L. Ed. 291, 55 S. Ct. 171. Here the Commonwealth of Massachusetts was operating the Boston Elevated Railway Company through members of a Board of Trustees set up by the Legislature. The trustees were appointed by the Governor of the Commonwealth and were charged with the duty of managing and operating the company. The trustees claimed exemption from

income tax, upon the ground that they were officers of the Commonwealth of Massachusetts, and that the Boston Elevated Railway was engaged in an operation as an instrumentality of the Government. It will be seen, however, that these trustees were appointed by the Governor of the State, and the City of Boston had no supervision whatever over the railroad. The court held that the trustees were subject to the tax, and said:

> "While the undertaking is for the purpose of the public benefit it is still a particular business enterprise—the operation of a street railway—and the functions of the trustees are limited accordingly."

It is implied in the court's opinion that if it were a political subdivision of the State of Massachusetts operating in a functional activity on behalf of the State, its trustees could not have been subject to this tax. It is submitted that all these cases are analogous to the case at bar, and the analogy is drawn on the implied immunity that exists when a governmental agency is being operated for the functional purpose of the State. We contend that the Public Belt Railroad System—and the cases so hold—is not being operated as a functional operation of the government but as a convenience and a profit-making enterprise to the citizens of New Orleans. Appellees contend that the railroad, being a political subdivision, would not come under the provisions of the Act. Yet, there is no doubt that the taxing power of the Federal Government would reach out to this particular type of enterprise for the purposes of taxation. The record shows that the court below placed "due respect" in the advisory opinion of the Wage and Hour Division that this railroad was exempt. In this regard the court said in the *Helvering* v. *Powers* case, in reference to regulations promulgated by the Treasury Department:

"Treasury regulations, manifestly in an effort to interpret and apply that limitation, provide for exemption from taxation of compensation paid by a state or political subdivision to its officers and employees only in case their services are rendered in connection with the exercise of an essential governmental function. *But the Treasury Department could not by its regulation either limit the provisions of the statute or define the boundaries of their constitutional application.*" (Italics ours.)

There is no question that the interpretation of an administration division of a national or State government should be given "due respect" or "great weight" by the court; but the court is not bound by an opinion rendered by a governmental officer when that opinion is clearly erroneous, and, particularly, when an investigation had not been made of the activity of the governmental enterprise; and in this case there was only an exchange of letters between counsel for the railway and counsel for the Wage and Hour Division. The opinion was certainly in discord with the *Helvering* v. *Powers* case which, continuing the opinion of the court:

"The nature of the enterprise and not the particular incidents of its management would control. In each case the State with its own conception of public advantage is undertaking a business enterprise of a sort that is normally within the reach of the Federal taxing power and is distinct from the usual governmental functions that are immune from Federal taxation in order to safeguard the necessary independence of the State."

and

"If in the instant case the Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the State government, instead of temporarily, or had taken over all

the street railways in all its cities for direct operation by the Commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would affect the withdrawal of the enterprise from the Federal taxing power, and the fact that the State has here undertaken public management and operation for a limited time and under the particular restrictions of the agreement with the Company, cannot be said to furnish a ground for immunity."

See:

South Carolina v. *United States*, 199 U. S. 437, 50 L. Ed. 261, 26 S. Ct. 110;
Oliver v. *Worcester* 102 Mass. 489;
Western Savings Fund Society v. *Philadelphia*, 31 Pa. 175.

It may be interesting to note that the Social Security Act and the National Labor Relations Act have set up the same exemption as the Fair Labor Standards Act as to states and political subdivisions thereof, but the administrative agencies of these two governmental bodies and the Courts are not in agreement to the decision rendered below in this case.

In *Boston Elevated Railway Co.* v. *Welch*, 25 Fed. Sup. 809, the plaintiff was the same Boston Elevated Railway in the *Helvering* v. *Powers* case, and it sued the Social Security Administrator for recovery of social security tax alleged to have been illegally assessed. Under the Social Security Act, the exemption is broader than in the Fair Labor Standards Act, and is as follows:

"services performed in the employ of a state, a political subdivision thereof or *an instrumentality of one or more states or political subdivisions.*" (Italics ours.)

It is interesting to note also that the Commissioner of Internal Revenue had regulated as exempt under the Act—

> "every unit or agency of government without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature."

But the Court, in its determination of whether the Boston Elevated Railway was actually a governmental agency or an instrumentality or a political subdivision of the state, did not agree with the regulation of the Commissioner of Internal Revenue, and said:

> "This regulation, of course, adds nothing to the strength of the exemption in the statute, but is indicative of a broad interpretation of the word 'instrumentality' so as to include within the exempted class all units or agencies of goverment whether engaged in performing essential governmental functions or not."

The Court held that the plaintiff, the Boston Elevated Railway, was not an instrumentality of the government.

> "The plaintiff contends that the facts show that the Commonwealth of Massachusetts has undertaken the carrying out of an enterprise to accomplish an admitedly public purpose in the interests of the general welfare. *Assuming all of this to be true, it does not necessarily follow that the adoption of such a policy by the Commonwealth operates to change the plaintiff from a private business into an instrumentality of the government within the meaning of the Social Security Act.*" (Italics ours.)

So that we have a decision under an Act which exempts a political subdivision or "an instrumentality of one or more states or political subdivisions" holding that the Boston Elevated Railway, which originated as shown in the *Helvering* v. *Powers* case, is subject to the provisions of the Social Security Act, even though the Commonwealth of Massachusetts had undertaken the operation of the railway. The

purpose of that statute was also remedial and for the good of employees, and, here again, we have a clear intent shown on the part of Congress to give to as many employees as possible the advantages obtainable under the Act. In its opinion the Court cited the *Helvering* v. *Powers* case.

See: *Buckstaff Bathouse Co.* v. *McKinley*, 308 U. S. 358, 84 L. Ed. 322.

Under all these Acts, including the one in question, the purpose of Congress was to uplift the worker. Under the Social Security Act, it is for the security of employees in their old age, and under the Fair Labor Standards Act for a high standard of wages and hours, and under the Wagner Act for the protection of employees in their right to secure these high standards of wages and hours through collective bargaining and their right to select a representative or union of their own choice. The decision of the Court Below, if it is upheld, destroys the rights and the advantages to be derived by this particular class of employees, because they happen to be working for a railroad operated by a Board of Commissioners under the City of New Orleans. After examination of all the Acts of Congress in reference to railroads and the decisions under those Acts, we can only come to but one determination, and that is that Congress clearly intended that employees of this particular type of railroad should be covered under the Fair Labor Standards Act. It would be an absurd position to take that the Public Belt Railroad is subject to the power of Congress in regulating interstate commerce under, for example, the Hours of Service Act, and not for the payment of wages under the Fair Labor Standards Act. If the Congress meant—and it is clearly shown that it did mean—to give the employees of all railroads, including this railroad, the benefits and advantages of shorter hours, can it logically be contended that it did not mean to give the same

employees the benefits of the Act in question, the purpose of which was higher wages?

Conclusion.

The Public Belt Railroad, at best is an agency of the City of New Orleans, engaged in a private enterprise for the benefit and profit of the people of the City of New Orleans. The state exercises no control or supervision over the railway. The railroad is subject to the Interstate Commerce power of the Federal Government. Congress never intended that these men be denied a living wage because they were employed by a Commission set up by the City of New Orleans. Congress has specifically granted to them old age benefits under the Railroad Unemployment Insurance Act and under the Retirement of Railroad Employees Act, and there is no justifiable or logical reason that it can be said that Congress intended that these employees and this employer should not come within the strict tenor of the Wage and Hour Act.

JAMES J. FARNAN,
MARTIN F. O'DONOGHUE,
THOMAS X. DUNN.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 127

E. CREEKMORE, GENERAL CHAIRMAN OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, ET AL.,

Petitioners,

versus

PUBLIC BELT RAILROAD OF NEW ORLEANS and CITY OF NEW ORLEANS, ET AL.,

Respondents.

BRIEF ON BEHALF OF THE PUBLIC BELT RAILROAD COMMISSION FOR THE CITY OF NEW ORLEANS AND THE CITY OF NEW ORLEANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF ON BEHALF OF THE PUBLIC BELT RAILROAD COMMISSION FOR THE CITY OF NEW ORLEANS AND THE CITY OF NEW ORLEANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioners brought this suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division, under the "Fair Labor Standards Act of 1938", Title 29 USCA, Secs. 201-219 (52 Stat. 1060)

against the Public Belt Railroad Commission for the City of New Orleans and the City of New Orleans for an alleged under payment of wages to certain employees of the Public Belt Railroad, plus an equal amount as liquidated damages, and attorney's fees.

Petitioners alleged that the Public Belt Railroad Commission "is a corporation or political entity, existing by virtue of the Constitution of the State of Louisiana, statutes of said State, and also by virtue of Ordinance No. 2683, New Council Series of the City of New Orleans, * * *."

Both the City of New Orleans and the Public Belt Railroad Commission for the City of New Orleans moved the District Court to dismiss petitioners' action because both their complaint and their supplemental and amended complaint failed to state a claim upon which relief could be granted.

The basis of respondents' motion to dismiss was that the operation of the Public Belt Railroad is by the City of New Orleans, by and through the Public Belt Railroad Commission for the City of New Orleans, and, the City of New Orleans, being a political subdivision of the State of Louisiana, is excluded in its operations of said Railroad, by and through the Public Belt Railroad Commission, by the very terms of the Fair Labor Standards Act of 1938 itself.

The District Court granted respondents' motion to dismiss and dismissed petitioners' complaint (R. p. 58). The opinion of the District Court will be found at R. p. 54.

Petitioners then appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the decision of the District Court (R. p. 72). The opinion of the Court of Appeals will be found at R. p. 69.

QUESTION INVOLVED.

The sole question involved herein is whether or not the City of New Orleans in its operation of the New Orleans Public Belt Railroad, by and through the Public Belt Railroad Commission for the City of New Orleans, is exempt from the provisions of the "Fair Labor Standards Act of 1938".

Paragraph (d), of Sec. 203, of Title 29 USCA, defines an "Employer" as follows:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

THE LAWS APPLICABLE TO THE PUBLIC BELT RAILROAD.

Although the complaint made both the City of New Orleans and the Public Belt Railroad Commission parties defendant, nevertheless, the Public Belt Railroad is, as heretofore stated, operated by the City of New Orleans, through said Commission.

The Public Belt Railroad Commission was originally created by Ordinance No. 147, New Council Series, of the City of New Orleans, adopted August 7, 1900. Thereafter, the Council, of the City of New Orleans adopted, on October 4, 1904, Ordinance No. 2683, New Council Series, which ordinance amended and re-enacted certain sections of Ordinance No. 147, N. C. S., repealed other sections thereof, and added new sections thereto. (R. p. 31).

The General Assembly of the State of Louisiana, by Act 179 of the Acts of 1908, authorized the City of New Orleans to issue $2,000,000 of bonds and to expend the proceeds of said bonds for the construction and equipment of a Public Belt Railroad system in and for the City of New Orleans. Said act provided that "the City of New Orleans shall construct, equip, maintain and operate said Public Belt Railroad System of the City of New Orleans through and by means of such board, or commission, as may have been or may be organized by the City of New Orleans, the members of which shall be appointed by the Mayor of the City of New Orleans with the consent of the Council, the powers, duties and functions of which shall be prescribed by the City of New Orleans." Said Act was submitted to the qualified electors of the State on November 3, 1908, and ratified. (See also Art. XIV, Sec. 26, Constitution of Louisiana, 1921).

By Act No. 68 of the Acts of 1916, the General Assembly of the State of Louisiana adopted a joint resolution proposing an amendment to the Constitution of the State of Louisiana, granting to the City of New Orleans power to construct, equip, maintain and operate, through and by

the Public Belt Railroad Commission of the City of New Orleans, bridges and tunnels across the Mississippi River at or near New Orleans, and to do various acts incidental thereto and to the operation generally of the Public Belt Railroad system of the City of New Orleans and providing for the submission of said amendment to the electors of the State for their approval or rejection. Said amendment was submitted to the qualified electors of the State on November 7, 1917, and ratified.

By Act No. 167 of the Acts of 1916, the General Assembly of the State of Louisiana amended Act No. 159 of the Acts of 1912 (the Charter of the City of New Orleans) so as to include therein additional provisions authorizing and empowering said City of New Orleans to extend, maintain, operate and develop its Public Belt Railroad system beyond the Parish of Orleans into any adjoining parish or parishes.

By Act No. 188 of the Acts of 1918, the General Assembly of the State of Louisiana adopted a joint resolution proposing an amendment to the Constitution of the State granting to the City of New Orleans an extension of time for the commencement and completion of the construction of a bridge or tunnel across the Mississippi River, under said Act No. 68 of 1916. Said amendment was ratified by the electors of the State on November 5, 1918.

In the Constitution of the State of Louisiana, adopted in 1921, Article XIV, Section 26, again provided that "It shall be the duty of the City of New Orleans to continue

the operation of a Public Belt Railroad by and through a commission to be known as the Public Belt Railroad Commission for the City of New Orleans, * * *."

By Article XIV, Section 27, of said Constitution of 1921, the City was authorized to issue New Orleans Public Belt Railroad Bonds, in a sum not to exceed $5,000,000, and by Section 28 thereof the City, acting through the Public Belt Railroad Commission, was granted the power to bridge the Mississippi River and to acquire and operate railroad facilities.

By Act No. 154 of the Acts of 1928, the Legislature of Louisiana adopted a joint resolution proposing an amendment to said Article XIV, Section 28, of the Constitution with regard to the construction of the bridge aforesaid. Said amendment was ratified by the electors of the State on November 6, 1928.

By Act No. 385 of the Acts of 1938, the Legislature of Louisiana adopted a joint resolution proposing another amendment to Article XIV of the Constitution, to be known as Section 31.3, to authorize the City of New Orleans, acting through the Public Belt Railroad Commission, to acquire, construct and maintain one or more railroad passenger stations in the City of New Orleans. Said amendment was ratified by the electors of the State on November 8, 1938.

The Supreme Court of the State of Louisiana has held in three cases that the Public Belt Railroad is owned

and operated by the City of New Orleans, acting by and through the Public Belt Railroad Commission for the City of New Orleans.

In *Davis v. New Orleans Public Belt Railroad*, 155 La. 504 (99 So. 419), the Court at p. 509, held as follows:

> "Its nature and purpose still remain the same, i. e., that it is a department of the city of New Orleans * * *."

In *Solomon v. City of New Orleans*, 156 La. 629 (101 So. 1), the Court, after referring to Act 179 of the Acts of 1908, and after stating that the entire and absolute control and administration of the Public Belt was recognized and confirmed in the City, to be exercised through a Commission to be appointed, or which had already been appointed, by the City, said:

> "Our conclusion is that the public belt railway system of New Orleans is owned and operated by the city * * *."

In *Higginbotham v. Public Belt Railroad Commission*, 192 La. 525 (188 So. 395), the Court held that the deceased was employed by the Commission which is, under the law, an agency of the City, and on page 544, said:

> "It thus appears that the Public Belt Railroad and the Huey P. Long Bridge were built and are maintained, controlled, and operated by the same authority or agency, the Public Belt Railroad Commission of the City of New Orleans * * *."

It will, therefore, be seen that by City Ordinance, Legislative Acts and Constitutional Provisions, and as held by the Supreme Court of Louisiana, the Public Belt Rail-

road is owned, operated and maintained by the City of New Orleans, by and through the Public Belt Railroad Commission for the City of New Orleans.

The Railroad operates exclusively as a switching line. It is not a stock corporation, nor even a separate entity; but is owned and operated directly by the City of New Orleans, through the Public Belt Railroad Commission.

The Supreme Court of Louisiana in *State v. Maitrejean*, 193 La. 824, 192 So. 361, said that "Municipal corporations are subdivisions of the state, * * *", and in *State v. Coulon*, 197 La. 1058, 3 So. 2d. 241, that "Parishes, municipalities, road districts, irrigation districts, drainage districts, etc., are political subdvisions of the state, created not by the Constitution but by the Legislature."

Petitioners in their petition, at p. 3 thereof, state that "The Trial Justice dismissed the amended complaint filing a written opinion (R. p. 58) holding that the Public Belt Railroad being wholly owned and operated by the City of New Orleans was expressly excluded by virtue of Section 3 (d) of the Act in that it was 'a political subdivision of a State' ". That is not exactly correct. The Trial Justice held (R. p. 55) that "The City of New Orleans is a political subdivision of the State of Louisiana; and, as was held in Davis vs. New Orleans Public Belt Railroad, 155 La. 504, 99 So. 419 (1923), the Public Belt Railroad Commission is a department of that City."

THE STATUTE DOES NOT NEED CONSTRUCTION.

Petitioners argue that the Congress intended that the Public Belt Railroad and, therefore, necessarily, the City of New Orleans, in its operation of the Public Belt Railroad, should be covered by and not exempted from the provisions of the act.

We respectfully submit that Paragraph (d) of Section 3 is perfectly clear when it excepts from the definition of "Employer" any State "or political subdivision of a State" and, therefore, there is no occasion in the case at bar to resort to rules of construction, the language being so plain as not to need construction.

In *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, at p. 277, this Court said:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction."

and at p. 278:

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

The District Court found (R. p. 57) that "Following the plain meaning of the statute's language, * * * leads to no absurd or impracticable consequences, nor thwarts the obvious purpose of the statute", and the Court of Appeal found (R. p. 71) that "The language of Section 3 (d) being plain, its meaning clear, the result reasonable, we see no reason for resorting to extraneous considerations in an effort to construe and give to such language another and different meaning."

In *Helvering v. New York Trust Co.*, 292 U. S. 455, at p. 464, this Court said:

> "The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose."

In *Kuehner v. Irving Trust Co.*, 299 U. S. 445, at p. 449, this Court said:

> "The legislative history of this provision, and the successive alterations of its wording in both houses of Congress and in conference, to which we are referred, cannot affect its interpretation, since the language of the act as adopted is clear."

In *Osaka Shosen Line v. United States*, 300 U. S 98, at p. 101, which was a case that went up to this Court from the Court below, this Court said:

> "To say that the passenger has not been brought to the United States unless the intent was to leave him here, is not to construe the statute but

to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction."

In *Helvering v. City Bank Co.*, 296 U. S. 85, at p. 89, this Court also said:

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

In *Federal Deposit Insurance Corporation v. Winton*, 131 Fed. 2d. 780, the Court of Appeals for the Sixth Circuit, citing Helvering v. N. Y. Tr. Co., supra; United States v. Mo. Pac. R. Co., supra, and other cases, said:

> "In our view of the case we are not required to determine whether the interpretation placed by the court upon Clause (i) (1) of 12B of the Act would tend to prevent contemplated evils because we find no room for interpretation or construction at all. The words 'less all subsequent withdrawals from any deposits of such depositor' as they appear in the italicized portion of the statute quoted are plain, simple and explicit. There is nothing doubtful about their meaning. The obvious meaning of the entire phrase, and one that is supported by Webster's definition of the word 'any' as 'one indiscriminately of *whatever kind* or quantity' (italics added), is that after the date of termination F. D. I. C.'s liability would be reduced by every withdrawal from deposits of the depositor of whatever kind and whenever made. There is no room for the construction of an unambiguous statute; not even where the purpose is to remove an apparent hardship."

Petitioners cite as authority for the holding that courts are not always confined to the literal meaning of a statute, because the letter, purpose and intent of the legislature will prevail over the literal import of the words, *Shelvy v. Guy*, 24 U. S. 361; *Chicago, etc., R. R. Co. v. Guffey*, 122 U. S. 561; *United States v. Holy Trinity Church*, 143 U. S. 457; and *Brown v. Duchesne*, 60 U. S. 183.

In *Shelvy v. Guy* there was involved the terms "beyond seas" in a state statute of limitation. At p. 369 the Court said "Nevertheless, as this cause must go back upon other grounds, we will, for the present, waive a positive decision on this point as applied to the State of Tennessee * * *."

The question in *Chicago, etc., v. Guffey*, was whether or not the word "lease" in a statute of Missouri included the word "purchase" because in part of the statute reference was made to "lease or purchase" and the holding there is not applicable to the case at bar.

In the *Holy Trinity Church* case, the question was whether or not the word "labor" included a minister of the gospel and the Court held that the common understanding of the term "labor" did not include preaching and preachers. That case, likewise, has no application hereto.

In *Brown v. Duchesne*, a patent infringement was involved. The Court there said that in expounding a statute, it would not give to it a construction which would in any degree disarm the government of a power which had been confided to it to be used for the general good "*unless*

plain and express words indicated that such was the intention of the legislature."

Petitioners cite *Richardson v. Harmon*, 222 U. S. 96, as authority for what they state is the well settled rule that the court will not look to a particular clause of an act only, in order to arrive at the intention of the law maker. The question there involved was whether or not the limited liability act in admiralty, which limits the liability of a ship owner to the proportion of any debts and liabilities, included any and all liability of the owner, whether maritime or not, and the court said that the provision was not as definite as desirable might be conceded.

Petitioners cite *Converse v. U. S.*, 62 U. S. 463, to the effect that statutes relating to the same subject are to be compared and should be read and construed in reference to each other. In that case, which involved certain claims for commissions against the Treasury Department, the court said:

> "The question to be decided on this exception is undoubtedly one of some difficulty. But the difficulty arises not so much from ambiguity of language in any one of the acts of Congress, as from the great number of acts passed from time to time on this subject, which have been referred to in the argument. They, for the most part, differ in language in some degree from one another, and are generally introduced in some clause or proviso of the usual annual appropriation law, or an appropriation to provide for previous expenditures, and yet all bear, with more or less force, on the question before us.
>
> * * * * * *

> "It is obvious, therefore, that in order to carry into execution the intention of the legislative department of the Government, these various laws on the same subject-matter must be taken together and construed in connection with each other."

The case of *State v. Gerhardt*, 44 N. E. 469, has reference to statutes regulating the sale of liquors. It seems that the legislature had for many years passed laws regulating and restricting such sales and the statutes involved and the facts in that case are not apposite.

OTHER FEDERAL LEGISLATION.

Petitioners say that the Lower Court completely ignored all other Federal legislation passed by the Congress of the United States on behalf of railroad employees, which was binding and covered all of the employees of the Public Belt Railroad, and refer to "The Safety Appliance Act", the "Hours of Service Act", the "Retirement of Railway Employees Act" and the "Railway Labor Act" as being applicable to the employees of the Public Belt Railroad. These statutes although applicable to railroads in general are not all on the same subject-matter and, therefore, there is no necessity or reason to construe the law involved herein in connection with any other law.

Petitioners cite the case of *State of California v. Anglim*, 129 F. 2d. 455. There the State of California attempted to evade the Carriers Taxing Act of 1937, 45 USCA 261, on the ground that the Constitution gave the Congress no power to impose the tax on it, and not as here, that it was excluded or exempted from the statute by the very wording of the statute itself. Neither the Carriers'

Taxing Act of 1937, nor the Retirement of Railway Employees Act, which were companion bills enacted at about the same time, the one to provide the revenue to make the expenditures for the other, exempted or excluded a State or any political subdivision of a State from its provisions.

THE CLAIMED EXEMPTION DOES NOT LEAD TO IMPRACTICABLE CONSEQUENCES.

Petitioners next contend that a strict construction should be placed on the claimed exemption of the respondents and the most liberal construction on the claimed coverage by the petitioners and that, construing the "Fair Labor Standards Act", "we have a Federal statute setting a minimum wage standard and yet the statutory bargaining agent is powerless under such Federal statute to compel the railroad carrier to pay the minimum wage ordered for all other railroad employees in the United States in the Maintenance of Way Department of railroads." They further contend that "It would be a strange rule of construction that would lead us into the 'bad results' and 'injurious consequences' by holding this carrier to be exempt under the Act". Both the Trial Court and the Lower Appellate Court held that excluding such employees does not lead to any absurd or impracticable consequences.

Petitioners cites *U. S. v. California*, 297 U. S. 175, as holding that a terminal railroad owned and operated by a State for the same purpose as respondents' railroad was subject to the Federal Safety Appliance Act. We have never denied that respondents are subject to the Federal Safety Appliance Act or any of the other mentioned acts applicable to railroads.

The exclusion from the provisions of the Fair Labor Standards Act of "the United States or any State, or political subdivision of a State," was not haphazardly done, but it was clearly the intention of the Congress to so exclude them. We find the same exclusion in the National Labor Relations Act of 1935, 29 USCA 151, Section 152, par. (2), of which provides that "The term 'Employer' includes any person acting in the interest of an Employer directly or indirectly, but shall not include the United States or any State or political subdivision thereof * * *", and in the Social Security Act, 42 USCA 301, Section 409, par. (b), sub. par. (7), of which excepts therefrom "Service performed in the employ of a State or any political subdivision thereof * * *". Respondents are likewise not subject to the Federal Income Tax Law. Section 116 (d) of the Internal Revenue Code exempts from taxation "Income derived from any public utility or the exercise of any essential Governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, * * *."

Petitioners also argue that in order to bring themselves within the exception under the act as a "political subdivision" respondents must bring themselves not only within the letter of the exception, but the spirit of the exception, and quote from *Bowie v. Gonzalez*, 117 F. 2d. 11. That case has no application. It involved the application to certain phases of the sugar industry in Puerto Rico of the Fair Labor Standards Act. There appellants maintained that they were exempt from both the wages and

hours provisions of the act on the ground that all of their employees were engaged in agriculture, and it was necessary for the Court to determine whether or not the processing of sugar cane into sugar was included within the term "agriculture", and the Court held that only the employees engaged in planting, cultivating and harvesting of the sugar cane, came under the exclusion.

Petitioners also quote from *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d. 52. In that case, the question was whether or not the employees of a company making buttons from clam shells were exempt from the wage and hour provisions of the Act by virtue of the exemption contained in Section 13 (a) (5), which provides that Sections 6 and 7 shall not apply to "* * * any employee employed in the catching, taking, harvesting, cultivating or farming of any kind of fish, shell fish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, * * *." The Court said:

> "The meaning of the statute must in the first instance at least be sought in its language, and if that is plain and the act is Constitutional, the sole function of the Court is to enforce it. (Citing case). If the statutory meaning is clear, there is, of course, no occasion to resort to rules of construction."

We respectfully submit that paragraph (d) of Section 3 of the Act is perfectly clear when it excepts from the definition of "Employer" any state "or political subdivision of a State". There is, therefore, no occasion to resort to rules of construction, as there was such occasion in the *Hawkeye Button Company* case.

Petitioners then quote from *U. S. v. American Trucking Association*, 310 U. S. 534, and quote from page 543. There again it was necessary to interpret the Federal Motor Carrier Act. In the very words quoted by petitioners, the Court said:

> "There is, of course, no more pursuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."

Petitioners also cite to the same effect *Town of Clayton v. Colorado and S. Ry. Co.*, 51 F. 2d. 977, and *Barrett v. Van Pelt*, 268 U. S. 85.

In the *Clayton* case, the Court said:

> "Where the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, resort must not be had, ordinarily, to rules of construction, but the statute must be given its plain and obvious meaning.
>
> * * * * * *
>
> "Had the Legislative body intended to exempt railway property from assessment as abutting property, the natural and ordinary method would have been to have added an exception to the general language of the original act."

In the *Barrett* case the Court said that

> "The language and structure of the second clause is so inapt and defective that it is difficult to give it a conclusion that is wholly satisfactory".

ADMINISTRATIVE RULING.

In answer to a letter written by us to "The Administrator of the Wage and Hour Division" on October 25, 1938 (R. p. 51), we received a letter signed by the Assistant General Counsel of the United States Department of Labor, Wage and Hour Division, Washington, D. C., dated July 10, 1939 (R. p. 53), in which he stated:

> "If the Public Belt Railroad System is wholly owned and controlled by the City of New Orleans, a political subdivision of the State of Louisiana, through the Public Belt Railroad Commission for the City of New Orleans, *it is our opinion that the employees of the Public Belt Railroad System are not subject to the Act by reason of the provision quoted above contained in Section 3 (d).*" (Italics ours).

It is true that administrative opinions or rulings are not binding upon the courts. Nevertheless, they are "entitled to great weight".

In *United States v. Amer. Trucking Ass'ns*, 310 U. S. 534, this Court, referring to an interpretation by the Interstate Commerce Commission and the Wage and Hour Division, of Section 204 (a) of the Motor Carrier Act, 1935, at P. 549, said:

> "The Commission and the Wage and Hour Division, as we have said, have both interpreted Sec. 204 (a) as relating solely to safety of operation. *In any case such interpretations are entitled to great weight.*" (Italics ours).

In *Missel v. Overnight Motor Transp. Co.*, 36 Fed. Sup. 980, the United States District Court for the Eastern District of Maryland, at p. 985, said:

> "In addition to the reasons just mentioned, there is something else which is at least very persuasive. It is this: As already shown, after the Wage and Hour Division of the Department of Labor, on March 25, 1939, ruled that all employees of common and contract carriers by motor vehicle, other than drivers, would be subject to the Fair Labor Standards Act with respect to hours, unless and until an order of the Commission determined to the contrary, the Commission itself formally confirmed this ruling on May 16, 1939 (Ruling No. 79). *Such action is entitled to great weight.*" (Italics ours).

In the same case, the United States Court of Appeals for the First Circuit, in 126 F. 2d. 98, at p. 108, said:

> "Although such interpretations are by no means binding on the courts, *we consider them highly significant.*" (Italics ours).

The *Missel* case came before your Honors just last year (see *Overnight Motor Co. v. Missel*, 316 U. S. 572), and there at p. 580 you said:

> "This has been the Administrator's interpretation of the Act. Interpretative Bulletin No. 4 issued October 21, 1938, revised November, 1940. While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application."

In *Bumpus v. Continental Baking Co.*, 124 F. 2d. 549, the Court held that

> "The contemporaneous construction of those charged with the administration of the provisions of a new law is entitled to great respect, Edwards' Lessee v. Darby, 12 Wheat. 206, 210, 6 L. Ed. 603, and has bearing here."

In *Bayley v. Southland Gasoline Co.*, 131 F. 2d. 412, at p. 414, the Court said:

> "Such interpretations by the agencies charged with the administration of the Acts are entitled to great weight."

NO DISTINCTION BETWEEN GOVERNMENTAL AND PROPRIETARY FUNCTIONS.

Petitioners try to draw a distinction between the functions of a State or a political subdivision when acting in its governmental and when acting in its proprietary capacity and cite several cases in connection therewith. We have never claimed that the City of New Orleans in the operation of this railroad system was acting in its governmental capacity; but, no distinction or exception is made in Section 3 (d) of the Act between a political subdivision of a State when acting in its governmental capacity and in its proprietary capacity. In fact the Wage and Hour Division of the Department of Labor drew no such distinction when it said:

> "Sec. 3 (d) justifies no distinction between governmental and proprietary functions of a municipality, and a wholly municipally owned switching and terminal company is exempt from the Act." (See Commerce Clearing House "Labor Law Service", Third Edition, Volume 2, at par. 23,600.37, W & H opinion letter, April 7, 1941).

Petitioners on this phase of the question refer to the leading case of *Helvering v. Powers*, 293 U. S. 13, where the question presented was whether the compensation of the members of the Board of Trustees of the Boston Elevated Railway Company was constitutionally exempt from the imposition of a federal income tax. The Court there held that the members of this Board of Trustees were subject to the tax, not because they were employees of a State or instrumentality of its government, but because the very act of the Commonwealth of Massachusetts provided "that the trustees and their employees shall be deemed to be acting as agents of the company, and not of the Commonwealth, and that the company shall be liable for their acts of negligence to the same extent as if they were in the immediate employ of the company * * *." Petitioners quote from page 223 of the decision, where the Court said:

> "While the undertaking is for the public benefit, it is still a particular business enterprise—the operation of a street railway—and the functions of the trustees are limited accordingly."

but they failed to quote the very next succeeding sentence to the following effect:

> "The property remains in private ownership."

There also the immunity sought by the trustees from payment of the federal income tax had not been granted by the Congress. The definitions of income in the Federal Income Tax Acts cover income derived "from compensation for personal services * * * of whatever kind and in whatever form paid," and the Court said that "this language is certainly broad enough to embrace the compensation of the trustees, and the immunity, if it exists, must rest upon

constitutional limitation." The taxing power of the Federal Government is not involved in the case at bar, such as it was in the *Helvering* case.

The case of *South Carolina v. United States*, 199 U. S. 435, also cited by petitioners, again involved certain employees of the state who sought exemption from liability under the internal revenue tax.

We have no quarrel with the cases of *Oliver v. Worcester*, 102 Mass. 489; *Western Savings Funds Society v. Philadelphia*, 31 Pa. 175; *Davoust v. Alameda*, 84 Pa. 760; *Baker & Co. v. Hollis*, 36 Pac. (2d) 757, or *O'Donnell v. N. Attleborro*, 98 N. E. 1084. Even our Supreme Court has held that the City of New Orleans, in its operation of the Public Belt Railroad, was liable for its torts. But being liable for its torts and being subject to an act which specifically exempts or excludes it from its operation is an entirely different matter.

Petitioners then cite the case of *Boston Elevated Railway Company v. Welch*, 25 F. Supp. 809, which was the same company involved in the case of *Helvering v. Powers*, supra. This case involved the Social Security Act. That Act excepted from the term "employment" "services performed in the employ of a state, political subdivision thereof or an instrumentality of one or more states or political subdivisions." The Court said:

> "If the plaintiff is within the meaning of the term 'instrumentality' then this regulation clears the way for its recovery and removes the possibility

> of a bar to such recovery, because the plaintiff was not engaged in an essential governmental function. It will first be necessary to bring the plaintiff within the classification of the statute, however, before it can lay claim to anything by virtue of the regulation."

The Court went on to find, as it did in the *Helvering* case, that the Boston Elevated Railway Company still existed as a corporation, but had merely abdicated its right to manage its properties; that the business was still conducted in the name of the company and all contracts for labor and supplies relating to the operation of its railway were made in its name; and that the act creating the trustees expressly provided that the trustees "shall be deemed to be acting as agents of the company and not of the Commonwealth." The Court then concluded that

> "the plaintiff (the Boston Elevated Railway Company) is not an instrumentality of the government, or a political subdivision thereof, within the meaning of the Social Security Act."

There is no denying that the Public Belt Railroad is an instrumentality of the City of New Orleans which latter is a "political subdivision of a state".

THE PETITION SHOULD BE DENIED.

We respectfully submit that the Public Belt Railroad Commission for the City of New Orleans is a department or agency of the City of New Orleans; and that the City of New Orleans is a political subdivision of the State of Louisiana. Whether the City of New Orleans, in its operation of said Public Belt Railroad by and through said

department or agency, is acting in its governmental or proprietary capacity is not an issue herein for the simple reason that Sec. 3 (d) justifies no distinction between the governmental and proprietary functions of a municipality. The exclusion or exemption provision of Sec. 3 (d), as stated by the Lower Appellate Court (R. p. 70) "is couched in plain and unambiguous language and should be given effect as written." It is only where the language of a statute is of doubtful meaning, or where adherence to the strict letter would lead to injustice or absurdity or result in contradictory provisions that the court should seek to ascertain the true meaning; but again, as stated by the Lower Appellate Court (R. p. 71):

> "In construing the Act the duty of the Court is to determine what employers and employees are within its coverage, not what employees 'should' have been covered, for the question of who 'should' be covered is a matter solely within the province of the legislative branch of the government. The language of Section 3 (d) being plain, its meaning clear, the result reasonable, we see no reason for resorting to extraneous considerations in an effort to construe and give to such language another and different meaning. Cf. Helvering v. New York Trust Co., 292 U. S. 455; United States v. Mo. Pacific R. Co., 278 U. S. 269."

We respectfully submit that the petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit should be denied.

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